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8 **UNITED STATES DISTRICT COURT**
 9 **FOR THE DISTRICT OF ARIZONA**

10

11 Robert Hagins and Tommie Woodard,
 12 individually and on behalf of the Knight-
 Swift Transportation Retirement Plan,

13 Plaintiffs,

14 vs.

15 Knight-Swift Transportation Holdings, Inc.,

16 Defendant.

Case No. 2:22-CV-01835-PHX-ROS

**DEFENDANT'S RESPONSE IN
 OPPOSITION TO PLAINTIFFS'
 MOTION AND MEMORANDUM
 OF POINTS AND AUTHORITIES
 IN SUPPORT OF MOTION FOR
 CLASS CERTIFICATION**

17 Plaintiffs' Motion for Class Certification ("Motion") fails to carry their burden to
 18 show that Rule 23's requirements are met for the putative class of "[a]ll persons who were
 19 participants in or beneficiaries of the [Knight-Swift Transportation Holdings, Inc.
 20 Retirement Plan ("Knight-Swift Plan")] at any time between October 26, 2016 and the
 21 present [(the "Proposed Class Period")].]" The Motion fails to alert the Court to the fact that
 22 there is no consistent, single "plan" at issue during the Proposed Class Period. To the
 23 contrary, the Knight-Swift Plan did not exist until January 1, 2019, and the predecessor
 24 plans which were merged together to form the Plan had separate fiduciary committees that
 25 made independent fiduciary decisions, engaged in independent courses of conduct, used
 26 different recordkeepers with different recordkeeping fee arrangement and rates, and had
 27 different plan investment lineups, the vast majority of which did not include any of the
 28 challenged investment funds in this case.

1 Moreover, the specific investment histories of the named Plaintiffs evidence a lack
 2 of damage from their articulated claims as well as divergent interests that demonstrate
 3 flaws in the adequacy, commonality, and typicality of the putative class. Plaintiff Woodard
 4 never invested in any of the funds Plaintiffs claim were imprudent, and Plaintiff Hagins
 5 never invested in three of those funds, so there is no question Plaintiffs lack standing to
 6 challenge the inclusion of three of the challenged funds. Moreover, analysis of participant-
 7 level data shows that ***Plaintiff Hagins and a majority of the putative class members were***
 8 ***better off at all times*** investing in the challenged funds than the alternative funds Plaintiffs
 9 claim were prudent; thus, they suffered zero injury with respect to these funds. The lack of
 10 injury-in-fact to Plaintiffs, and discovery to-date about the revenue sharing arrangement
 11 for the Knight-Swift Plan, cast serious doubt on the merits of Plaintiffs' claims, and run
 12 afoul of the fundamental requirement that all members of a putative class must suffer an
 13 injury-in-fact for Article III standing.

14 Plaintiffs' failure to engage with these differences and explain to the Court how they
 15 can effectively be managed on a class-wide basis¹ undercuts their attempt to demonstrate
 16

17 ¹ Plaintiffs' counsel simply makes the blanket assertion that the claims in this case are very
 18 similar to those alleged in *Gotta v. Stantec Consulting Servs., Inc.*, 2:20-cv-01865-GMS
 19 (D. Ariz.), where he served as local counsel, and because "the Honorable G. Murray
 20 Snow...granted class certification" in that case this Court should reach the same result.
 21 (Doc. 43 at 6). This assertion fails to note that defendants in *Gotta did not oppose class*
 22 *certification*, much less raise evidentiary issues similar to those present in this case.
 23 *Compare* 2:20-cv-01865-GMS, at [Doc. 59]. Moreover, comparing the motion for class
 24 certification filed in *Gotta* to this one—including specifically the misleading summary of
 25 deposition testimony to date—further confirms Plaintiffs' counsel's failure to
 26 meaningfully engage with the specific facts of this case. Improbably, this section of
 27 Plaintiffs' Motion, which is clearly intended to do nothing more than prejudice the Court
 28 on the merits as it does nothing to demonstrate the adequacy, commonality, or typicality
 of Plaintiffs' claims, tracks assertion for assertion the purported flaws which Plaintiffs'
 counsel claimed were "exposed" in the *Gotta* case and included in the motion for class
 certification filed there. *Compare Gotta*, at [Doc. 57 at 10-14] (summarizing "deposition
 testimony confirming fiduciary breaches" as including admissions of no fiduciary
 experience or training, that committee members abdicated fiduciary duties; that committee
 members lacked basic knowledge of investments, of the investments in the plan, and of
 compensation paid to the recordkeeper; and that there was some flaw in committee
 members not reviewing the complaint filed in this action), with (Doc. 43 at 10-14 (same)).
 While Defendant does not concede the accuracy of the cherry-picked deposition testimony
 cited in Plaintiffs' Motion, the claimed facts do not bear on the relevant issues for class
 certification.

1 the typicality and commonality necessary to maintain class claims. Thus, Plaintiffs' Motion
 2 should be denied.

3 **I. BACKGROUND**

4 **A. Plaintiffs' Claims and the Knight-Swift Plan**

5 Plaintiffs allege Defendant breached its fiduciary duty under ERISA in two ways:
 6 (1) by selecting and retaining ten retail share classes (nine American Funds "A" share
 7 classes and one JP Morgan Small Cap R5 share class) despite allegedly identical but
 8 cheaper institutional share classes being available (the "Challenged Share Classes"); and
 9 (2) by paying an excessive recordkeeping fee to Principal particularly when factoring in
 10 float income (the "Challenged Recordkeeping Fee"). (*See* Doc. 1). Contrary to the assertion
 11 in Plaintiffs' Motion, the Complaint focuses solely on expense of the Challenged Share
 12 Classes; there is no allegation that any funds "underperformed." (*Compare* Doc. 1 with
 13 Doc. 43 at 5).

14 Although Plaintiffs' Motion suggests that there was one "plan" throughout the entire
 15 Proposed Class Period, the Knight-Swift Plan did not exist until January 1, 2019.
 16 (Declaration of Rachel Monti ("Monti Decl.") ¶ 7). Indeed, Knight Transportation, Inc.
 17 ("Knight") and Swift Transportation Company, Inc. ("Swift") were two separate
 18 companies until 2017. (*See id.* ¶ 3). Unsurprisingly, during this time, the respective 401(k)
 19 plans for these separate companies were managed by separate fiduciary committees that
 20 made fiduciary decisions independently of one another, in the best interest of their separate
 21 plans.² (*See id.* ¶ 6). During this time, the Knight Plan did not include the Challenged Share
 22 Classes and did not use Principal as recordkeeper. (*See* Declaration of Wesley E. Stockard
 23 ("Stockard Decl.") at ¶¶ 3-4 & Exs. 1-2 (Knight Plan 2016 and 2017 Form 5500s)).

24 After Swift merged with Knight in 2017, the Swift Committee began separately

25
 26 ² Specifically, the Swift Transportation Co., Inc. 401(k) Plan ("Swift Plan") was
 27 administered by the Swift Transportation Co., Inc. Retirement/Deferred Compensation
 28 Plan Administrative Committee ("Swift Committee"). The Knight Transportation, Inc.
 401(k) Plan ("Knight Plan") was administered by the Knight Retirement Plan Committee
 ("Knight Committee"). (*See* Monti Decl. ¶ 6).

1 managing the 401(k) plans of the merged entities. (See Monti Decl. ¶¶ 4, 6 & Ex. 1 (1/26/18
 2 Swift Committee Minutes showing Knight Plan and Swift Plan being operated with
 3 separate terms and separate investment lineups)). During this time, minutes reflect that the
 4 Swift Committee considered each of the predecessor plans independently³, making
 5 separate decisions about each plan's respective investments and administrative expenses
 6 as they worked to determine what the Knight-Swift Plan would ultimately look like. (See
 7 *id.*). During this time, four of the Challenged Share Classes—the EuroPacific Growth A,
 8 the Am Gov Securities A, the New Economy Fund A, and the Wash Mutual Inv Fund A—
 9 were added to the Knight Plan and it began using Principal as recordkeeper. (See Stockard
 10 Decl. ¶ 5 & Ex. 3 (Knight Plan 2018 Form 5500); *see also* Monti Decl. at Ex. 1 p. 2 (1/26/18
 11 Swift Committee minutes reflecting decision to engage Principal as the recordkeeper for
 12 the Knight Plan), ¶ 5 & Ex. 2 p. 1 (5/17/18 Swift Committee minutes reflecting that Knight
 13 Plan would change its recordkeeper to Principal effective 9/1/18)).

14 Ultimately, effective January 1, 2019, the Knight-Swift Plan was created. (Monti
 15 Decl. ¶ 7 & Ex. 2 p. 2 (5/17/18 Swift Committee Minutes showing Committee approval
 16 for “all plans harmonizing as of January 1, 2019”), Ex. 3 p. 1 (3/29/19 Knight-Swift
 17 Transportation Retirement/Deferred Compensation Plan Administrative Committee
 18 (“Knight-Swift Committee”) Minutes showing the blackout date for the new Knight-Swift
 19 Plan was lifted 1/18/19 and the new consolidated investment lineup was “[e]ffective
 20 January 1, 2019”). The Knight-Swift Plan has included the Challenged Share Classes and
 21 used Principal as recordkeeper since inception. (Stockard Decl. ¶¶ 16-20 & Exs. 14-18
 22 (2019 through 2023 Knight-Swift Plan Form 5500s); Monti Decl. ¶ 8).

23 Ongoing acquisition activity since 2019 has led to several other plans being rolled

24
 25 ³ Before the beginning of the Proposed Class Period, Knight acquired Barr-Nunn, which
 26 had its own separate 401(k) plan (“Barr-Nunn Plan”). (Monti Decl. ¶ 4). Until 2019 when
 27 the Knight-Swift Plan was formed, the Barr-Nunn Plan was managed separately from the
 28 Knight Plan by first the Knight Committee and, beginning in 2017, the Swift Committee.
 (See *id.* ¶¶ 4, 6). This Barr-Nunn Plan did not offer any of the Challenged Share Classes
 during the Proposed Class Period. (See Stockard Decl. ¶¶ 6-8 & Exs. 4-6 (2016 through
 2018 Barr-Nunn Plan Form 5500s)).

1 into the Knight-Swift Plan, including the Abilene Motor Express 401(k) Plan, the National
 2 Tractor Trailer School 401(k) Plan, the MME 401(k) Plan, the Eleos Techs. 401(k) Plan,
 3 the Hayes Co. 401(k) Plan, and the AAA Cooper Transportation 401(k) Plan (*See* Monti
 4 Decl. ¶ 9 & Ex. 4 (12/6/19 Knight-Swift Committee minutes discussing Abilene Motor
 5 Express 401(k) Plan integration), Ex. 5 p. 3 (4/3/20 Knight-Swift Committee minutes
 6 approving merger of National Tractor Trailer School 401(k) Plan into Knight-Swift Plan),
 7 Ex. 6 p. 1 (12/21/21 Knight-Swift Committee minutes noting merger of MME 401(k) Plan
 8 into Knight-Swift Plan), Ex. 7 p. 4 (6/4/21 Knight-Swift Committee minutes noting merger
 9 of Eleos Techs. 401(k) Plan and Hayes Co. 401(k) Plan into Knight-Swift Plan), Ex. 8 p. 2
 10 (6/22/22 Knight-Swift Committee minutes noting merger of AAA Cooper Transportation
 11 401(k) plan into Knight-Swift Plan and AAA Cooper and MME changing recordkeeper to
 12 Principal)). Plaintiffs have offered no evidence that any of these plans offered the
 13 Challenged Share Classes prior to integration with the Knight-Swift Plan.

14 **B. Plaintiffs' Limited Investment In Challenged Share Classes and**
 15 **Failure to Pay Administrative Fees.**

16 To support the Motion, Plaintiffs aver only that they were participants in the Knight-
 17 Swift Plan. (*See* Docs. 43-1, 43-2). They present no evidence they were invested in the
 18 Challenged Share Classes or that they paid the Challenged Recordkeeping Fee. (*See id.*).
 19

20 However, Plaintiffs' account statements show that Plaintiff Woodard was not
 21 invested in **any** Challenged Share Classes at any time from October 26, 2016 through the
 22 third quarter of 2022. (Stockard Decl. ¶ 10 & Ex. 8 (Woodard's Knight-Swift Plan
 23 statements)). Plaintiff Hagins was invested in just seven of the ten Challenged Share
 24 Classes during the same period. (*Id.* ¶ 9 & Ex. 7 (Hagins' Knight-Swift Plan statements)).
 25 There is thus no evidence either named Plaintiff was ever invested in the Cap World
 26 Growth Class A, EuroPacific Growth Class A, or JP Morgan Small Cap Class R5. (*Id.* ¶¶
 27 9-10 & Exs. 7-8).

28 Plaintiffs' account statements also show that Hagins did not make **any** payments out
 29 of his account for fees—including recordkeeping fees. (*Id.* ¶ 9 & Ex. 7). To the contrary,

1 they reflect adjustments that show the revenue sharing associated with the Challenged
 2 Share Classes actually *increased* Hagins' account balances through fee adjustment credits
 3 during the Proposed Class Period. (*Id.*). In other words, Hagins received money to his
 4 account specifically because of the share class arrangement that he challenges here. (*See*
 5 *id.*).

6 **C. The Proposed Class Seeks to Encompass Individuals Regardless of**
Their Challenged Share Classes or Recordkeeper.

7 Plaintiffs seek to certify: "All persons who were participants in or beneficiaries of
 8 the Plan at any time between October 26, 2016 and the present." (Doc. 43 at 5). Because
 9 Plaintiffs define the "Plan" as the Knight-Swift Transportation Holdings, Inc. Retirement
 10 Plan" (*id.*), which did not exist until January 1, 2019, by definition Plaintiffs' putative class
 11 is limited to only those who participated in or were beneficiaries under the Knight-Swift
 12 Plan.

13 If Plaintiffs intend to include all predecessor plans, this would include participants
 14 who (1) were not even offered, much less invested in, the Challenged Share Classes (i.e.,
 15 putative class members who were only participants and/or beneficiaries in the Knight Plan
 16 prior to 2018, or who were only participants and/or beneficiaries in one of the plans later
 17 merged into the Knight-Swift Plan prior to integration with the Knight-Swift Plan), and (2)
 18 were invested in plans that did not use Principal as the recordkeeper. *See supra* at pp. 3 –
 19 5. This is particularly salient to the questions of commonality and typicality of claims
 20 among absent class members, given the high turnover in Defendant's work force (as it true
 21 for all large motor carriers). (Monti Decl. ¶ 10 & Ex. 9 (3/5/21 Knight-Swift Committee
 22 minutes noting that the "Driver market remains the biggest headwind" to the company's
 23 business), Ex. 6 (12/21/21 Knight-Swift Committee Minutes noting company "still ha[s]
 24 labor challenges")).

25 **D. Revenue Sharing in the Challenged Share Classes Creates Divergent**
Interests Among Named Plaintiffs and Putative Class Members

27 As Plaintiffs' Motion recognizes, the American Funds A Share Classes (which make
 28 up nine of the ten Challenged Share Classes) were included in the Plan because committee

1 members understood there was a grandfathered revenue sharing arrangement that made
 2 these share classes more advantageous, on the whole, to plan participants than institutional
 3 share classes. (See Doc. 43 at 13; *see also* Brad Stewart Dep. at 126:11-128:21; Rachel
 4 Monti Dep. at 54:1-5, 58:19-59:18, 68:4-25; Cheryl Maccano Dep.⁴ at 26:15-27:3, 36:7-
 5 12; Monti Decl. ¶ 11 & Ex. 10 (12/1/17 Swift Committee minutes noting of 0.23% fund
 6 manager credits to the Swift Plan, approximately 0.06% came from “American Funds
 7 grandfathered \$12/participant/fund A-share arrangement” and that the Swift Plan had
 8 “done a great job capitalizing on maintaining the American Funds grandfathered A-share
 9 arrangement” which was “very effective”)). Specifically, this arrangement allowed
 10 participants not only to take advantage of the standard 25 basis points of revenue sharing,
 11 but also to receive up to an additional \$12 in revenue sharing credits each year.⁵ (See
 12 Stockard Decl. ¶¶ 14-15 & Exs. 12-13 (2021 and 2022 Knight-Swift Plan Fee Summaries)).

13 Given this arrangement, it is apparent that participant preference for the American
 14 Funds A Share Classes over institutional share classes would vary depending on how much
 15 each individual had invested in each fund, as the institutional share class tips toward being
 16 cheaper only when an individual has enough invested in that fund for the difference in basis
 17 points charged between them to be more than \$12. By way of example, in October of 2022,⁶
 18 the cost of the Challenged Share Classes as compared to the institutional share classes
 19 Plaintiffs allege were more prudent was as follows:

Challenged Fund	Total Investment Fee	Revenue Sharing	Net Investment Fee	Total Expense Ratio ⁷ of Plaintiffs'	Difference
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22 ⁴ Deposition excerpts are attached as Exhibits 9 to 11 to the Declaration of Wesley E.
 23 Stockard, respectively.

24 ⁵More specifically, this arrangement credits each participant who had \$250 or more
 25 invested in an American Funds A Share investment with \$1 per month in revenue sharing.
 26 As a result, participants could get up to an additional \$12 per year in revenue sharing credits
 27 for *each* A Share investment. (See Stockard Decl. ¶¶ 14-15 & Exs. 12-13 (2021 and 2022
 Knight-Swift Plan Fee Summaries)).

28 ⁶ Data in this chart comes from the Complaint and 2022 Knight-Swift Plan Fee Summary
 (See Doc. 1 ¶ 88; Stockard Decl. ¶ 15 & Ex. 13).

⁷ This comparator fund has no revenue sharing.

				Comparator	
1	Am. Balanced Fund	0.56%	0.25%	0.31%	0.25% .06%
2	Am. Small Cap World	1.02%	0.25%	0.77%	0.65% .12%
3	Am. Cap. World Growth	0.75%	0.25%	0.50%	0.40% .10%
4	Am. EuroPacific Growth	0.80%	0.25%	0.55%	0.46% .09%
5	Am. Gov. Securities	0.62%	0.25%	0.37%	0.22% .15%
6	Am. Invest Co. of Am.	0.57%	0.25%	0.32%	0.27% .05%
7	Am. New Economy Fund	0.74%	0.25%	0.49%	0.41% .08%
8	Am. New Perspective Fund	0.72%	0.25%	0.47%	0.41% .06%
9	Am. Wash Mutual Inv. Fund	0.56%	0.25%	0.31%	0.26% .05%
10	JP Morg. Small Cap	0.80%	0.10%	0.70%	0.74% -.04%
11					
12					
13					
14					
15					

At this point in time, a member of the putative class would prefer the A Share Class of the Am. Balanced Fund with \$12 additional revenue sharing credit, so long as .06% of their balance in the fund was less than \$12 – in other words, if their balance invested in the fund was less than \$20,000. As another example, at this point in time a member of the putative class would prefer the A Share Class of the Am Gov. Securities Fund, with its \$12 additional revenue sharing credit, so long as .15% of their balance in that fund was less than \$12 – in other words, if their balance invested in the fund was less than \$8,000. Thus, putative class members with small balances are more likely to prefer the flat \$12 revenue sharing credit of the grandfathered A Share Class arrangement over the corresponding percentage cost reduction of institutional share classes that Plaintiffs advance here.

Large portions of the putative class are better off under the grandfathered A Share Class arrangement. Using individual account data, Defendant's expert concluded that, in each quarter from inception of the Knight-Swift Plan through Q3 2023, at least 64% (and

1 *in certain quarters up to 79%) of putative class members were better off with A Share*
 2 **Classes** than institutional share classes. (See Declaration of Steve Gissiner (“Gissiner
 3 Decl.”) ¶¶13 – 14 & Ex. 1). This includes the only named Plaintiff to invest in the share
 4 classes (Hagins) who benefitted substantially from those share classes as compared to the
 5 ones he claims are better. (*Id.* ¶¶15 – 16 & Ex. 2).

6 **II. LAW AND ARGUMENT**

7 **A. Plaintiffs Must Prove that Class Certification Is Warranted**

8 Plaintiffs seeking class certification must meet all the requirements of Rule 23(a)
 9 and one of the requirements of Rule 23(b). Fed. R. Civ. P. 23. Plaintiffs bear the burden of
 10 showing that these requirements are met because “the class action is an exception to the
 11 usual rule that litigation is conducted by and on behalf of the individual named parties
 12 only.” *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

13 Particularly where there has been substantial discovery, as here, Rule 23 is “not []a
 14 mere pleading standard.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rather,
 15 Plaintiffs are required to demonstrate with “evidentiary proof” that the requirements of
 16 Rule 23 are met. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). The Ninth Circuit has
 17 held that this required “evidentiary proof” must be established by a “preponderance of the
 18 evidence.” *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31
 19 F.4th 651, 664-65 (9th Cir. 2022).

20 Courts have consistently recognized the Rule 23 “analysis will frequently entail
 21 ‘overlap with the merits of plaintiff’s underlying claim,’ ... because the ‘class
 22 determination generally involves considerations that are enmeshed in the factual and legal
 23 issues comprising the plaintiff’s cause of action.’” *Comcast*, 569 U.S. at 33-34 (quoting
 24 *Dukes*, 564 U.S. at 351). Given the conflicts of interest here, this analysis is particularly
 25 important because “[s]erious conflicts of interests can impair adequate representation by
 26 the named plaintiffs, ***yet leave absent class members bound to the final judgment, thereby***
 27 ***violating due process.***” *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, &*
 28 *Prods. Liab. Litig.*, 895 F.3d 597, 607 (9th Cir. 2018) (emphasis added).

1 **B. Plaintiffs Do Not Satisfy the Adequacy Requirement.**

2 Rule 23(a)(4) seeks to vindicate “the constitutional requirement … that ‘the named
 3 plaintiff at all times adequately represent the interests of the absent class members,’” who
 4 will be bound by the outcome of the litigation. *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 848
 5 n. 24 (1999) (quoting *Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797, 812 (1985)). This
 6 adequacy requirement asks “whether … the class claims are so interrelated that the interests
 7 of the class members will be fairly and adequately protected in their absence.” *Falcon*, 457
 8 U.S. at 157, n. 13; *see also Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*, 222
 9 F.3d 52, 60 (2d Cir. 2000). Plaintiffs completely fail to meet this requirement here.

10 Plaintiffs have not established they are adequate class representatives because they
 11 have not presented any evidence that they suffered the necessary injury in fact to support
 12 Article III constitutional standing for the claims they are pursuing. *See Paulsen v. CNF*
 13 *Inc.*, 559 F.3d 1061, 1072 (9th Cir. 2009) (explaining that constitutional standing requires
 14 an “injury in fact” and a “causal connection between the injury and the conduct complained
 15 of”); *In re Packaged Seafood Prod. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1096 (S.D. Cal.
 16 2017) (explaining that named plaintiff cannot adequately serve as class representative
 17 without Article III constitutional standing). With regard to the Challenged Share Classes,
 18 there is no evidence that Woodard invested in *any* of them, and *it does not appear that*
 19 *either Plaintiff invested in the* Cap World Growth Class A, EuroPacific Growth Class A,
 20 or JP Morgan Small Cap Class R5 *at all*. As a result, Plaintiffs have no interest in
 21 prosecuting the theory that these three specific Challenged Share Classes were more
 22 expensive than their functional equivalent institutional share classes, nor constitutional
 23 standing to pursue it. Plaintiffs are thus fundamentally inadequate to represent a class in
 24 pursuing these claims. *Cf. In re Packaged Seafood Prod. Antitrust Litig.*, 242 F. Supp. 3d at
 25 1096; *see also, e.g., Spano v. Boeing*, 633 F.3d 574, 586-88 (7th Cir. 2011) (“[A] class
 26 representative in a defined-contribution case would *at a minimum* need to have invested
 27 in the same funds as the class members.”) (emphasis added); *Lopez v. Embry-Riddle*
 28 *Aeronautical Univ., Inc.*, No. 6:22-CV-1580-PGB-LHP, 2024 WL 775213, at *3 (M.D.

1 Fla. Feb. 26, 2024) (denying motion for class certification where plaintiff presented no
 2 evidence she had suffered harm); *Marshall v. Northrop Grumman Corp.*, No. CV 16-06794
 3 AB (JCX), 2017 WL 2930839, at *7 (C.D. Cal. Jan. 30, 2017) (dismissing complaint for
 4 lack of standing where it alleged a breach of fiduciary duty based on the underperformance
 5 of a specific named fund, but did not allege that any named plaintiff was invested in that
 6 fund).

7 Moreover, even though Hagins invested in the other seven Challenged Share
 8 Classes, he has offered no evidence to establish that their selection over the institutional
 9 share classes caused him any injury. To the contrary, his account balance in each fund is
 10 relatively low—at no time during the Proposed Class Period did his account balance in any
 11 of the American Funds A Share Classes (other than the Am. Balanced Fund) exceed
 12 \$6,000. (See Stockard Decl. ¶ 9 & Ex. 7). As a result, Hagins was personally better off
 13 continuing to receive the flat \$12 grandfathered additional revenue sharing credit for each
 14 fund instead of the additional basis points he would have saved if he had been able to invest
 15 in institutional share classes. (See Gissiner Decl. ¶¶15 – 16 & Ex. 2). Given this lack of
 16 harm, Plaintiffs have not carried and cannot carry their burden to show Hagins is an
 17 adequate class representative with an injury in fact that allows him to pursue the
 18 Challenged Share Class claim on behalf of the Plan. *Cf. Spano*, 633 F.3d at 586-88;
 19 *Marshall*, 2017 WL 2930839, at *7; *In re Packaged Seafood Prod. Antitrust Litig.*, 242 F.
 20 Supp. 3d at 1096.

21 Still further, Plaintiffs have offered no evidence to establish Hagins’ adequacy to
 22 represent the class with regard to the Challenged Recordkeeping Fee. As his quarterly Plan
 23 statements illustrate, he never paid any Challenged Recordkeeping Fee in the Proposed
 24 Class Period. (Stockard Decl. ¶ 9 & Ex. 7). To the contrary, he was actually *credited*
 25 additional funds as a fee adjustment. (*Id.*). As a result, there is no evidence of harm to
 26 Hagins from the Challenged Recordkeeping Fee and he is an inadequate representative
 27 with no standing or incentive to vigorously represent the interests of the putative class in
 28 prosecuting such a claim. *Cf. Spano*, 633 F.3d at 586-88; *Lopez*, 2024 WL 775213, at *3;

1 *Marshall*, 2017 WL 2930839, at *7; *In re Packaged Seafood Prod. Antitrust Litig.*, 242 F.
 2 Supp. 3d at 1096.

3 **C. Plaintiffs Have Failed to Establish Typicality and Commonality.**

4 Relatedly, Plaintiffs have not established their claims are common or typical of the
 5 putative class. The Supreme Court has recognized “[t]he commonality and typicality
 6 requirements of Rule 23(a) tend to merge....” both with each other and the adequacy of
 7 representation requirement set out above. *Dukes*, 564 U.S. at 349 & n.5 (quoting *General*
 8 *Telephone Co. of Sw. v. Falcon*, 457 U.S. 147, 157, n.13 (1982)). To establish
 9 commonality, a plaintiff must show the claims of the class “depend upon a common
 10 contention” that is “capable of classwide resolution,” which means “determination of its
 11 truth or falsity will resolve an issue that is central to the validity of each one of the claims
 12 in one stroke.” *Id.* at 349-350. Similarly, “[t]o establish typicality under Rule 23(a)(3), the
 13 party seeking certification must show there is “enough congruence between the named
 14 representative’s claim and that of the unnamed members of the class to justify allowing the
 15 named party to litigate on behalf of the group.” *Spano*, 633 F.3d at 586. To meet these
 16 requirements, Plaintiffs must show their “incentives … are aligned with those of the class.”
 17 *Schering Plough*, 589 F.3d at 598 (citation omitted). It is not enough that Plaintiffs’ “legal
 18 theory and legal claims” be typical of those of the class. *Id.* at 598. Rather, “the **individual**
 19 **factual circumstances** underlying [Plaintiffs’] legal theory and legal claims” must be
 20 typical as well. *Id.* (emphasis added).

21 The legal theories and claims advanced in the Complaint do not satisfy this standard
 22 because the evidence shows they are rife with direct, irreconcilable conflicts among
 23 putative class members as to which theories of recovery are most beneficial and should be
 24 prioritized for prosecution. First, there is no one course of conduct by one governing “plan
 25 committee” to evaluate during the entirety of the Proposed Class Period as the Knight-
 26 Swift Plan did not exist until January 1, 2019. (Monti Decl. ¶ 7). To the extent Plaintiffs
 27 seek to represent a class covering time periods before that date, there are multiple plans,
 28 governed by multiple committees or, at the very least, with a committee making

1 independent decisions about each plans' lineup and recordkeeping fees. (*Id.* ¶¶ 3-6).
 2 Further, there are non-uniform investments available for various participants depending on
 3 which predecessor plan they participated in prior to 2019 and the time period during which,
 4 if any, they were part of the Knight-Swift Plan itself. (*Cf.* Stockard Decl. ¶¶ 3-8 & Exs. 1-
 5 6). Plaintiffs' choice to pursue a certified class that predates the creation of the Knight-
 6 Swift Plan and their complete failure to acknowledge these distinctions in their Motion—
 7 much less articulate a method that would permit the Court to deal with these divergent
 8 interests in the class context—both demonstrates the failure of their Motion to show class
 9 certification is appropriate by a preponderance of the evidence and casts doubt on counsel's
 10 adequacy to represent the putative class. *See Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d
 11 1157, 1161 (9th Cir. 2013) (reversing approval of class action settlement where there is a
 12 “patent divergence of interests between the named representatives and the class,” because
 13 the class representatives and class counsel did not adequately represent absent class
 14 members).

15 Moreover, even if the time frame for the putative class is confined to the period in
 16 which the Knight-Swift Plan actually existed, the record evidence shows that whether the
 17 theory of recovery pursued related to the Challenged Share Classes would benefit any
 18 individual putative class member is a highly individualized inquiry impacted by (1) the
 19 specific cost and revenue sharing associated with the American Funds A Share Class in
 20 which that person is invested, (2) the specific cost of the proposed substitute institutional
 21 share class, and (3) the specific amount that each putative class member has in that specific
 22 Challenged Share Class. The existence of such conflicts is not hypothetical; individual
 23 account balance data shows that on a quarterly basis at least 64% and as much as 87% of
 24 putative class members would have been better off in the Challenged Share Classes, pitting
 25 them against the minority of putative class members who would actually prefer for the
 26 claims alleged in the Complaint to be prosecuted. (Gissiner Decl. ¶¶13 – 14 & Ex. 1). Given
 27 that Supreme Court precedent requires not only the named plaintiff have injury in fact
 28 standing to act as an adequate class representative, but that each member of a class likewise

1 must have standing to proceed under Rule 23, the lack of injury for a majority of the
 2 putative class here critically undermines Plaintiffs' Motion. *TransUnion LLC v. Ramirez*,
 3 141 S. Ct. 2190, 2208 (2021).

4 This lack of commonality and typicality, competing interests, and failure to
 5 demonstrate the existence of common or consistent harm among the putative class
 6 members is particularly problematic given that Plaintiffs' Motion seeks to certify a
 7 mandatory class under Rule 23(b)(1), with no notice or opt-out rights. (Doc. 43 at 18); *see*
 8 *also Dukes*, 564 U.S. at 345. By pursuing class wide relief under this provision, granting
 9 Plaintiffs' Motion would necessarily bind all absent class members – including the
 10 **majority** of class members who benefitted from including the American Funds A Shares
 11 as an investment option in the Plan – to Plaintiffs' counsel's theories of recovery, depriving
 12 absent class members (who have no option to opt out and then pursue their own claims) of
 13 the opportunity to develop their own evidence or prioritize the theories of imprudence in a
 14 way that would maximize recovery for themselves. *Cf. Cooper v. Fed. Reserve Bank of*
 15 *Richmond*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary
 16 principles of prior adjudication a judgment in a properly entertained class action is binding
 17 on class members in any subsequent litigation."); *Taylor v. Enterprise Rent-A-Car Co.*, No.
 18 10-1849, 2011 WL 13214090, at *4 (C.D. Cal. June 24, 2011) ("[T]he 131,495 members
 19 of the Withrow class who did not opt out of the case are bound by the Withrow settlement;
 20 their claims have been extinguished and they cannot re-litigate their claims in Plaintiffs'
 21 separate class action."); *Amalfitano v. Google, Inc.*, No. 14-cv-00673, 2015 WL 456646,
 22 at *3 (N.D. Cal. Feb. 2, 2015) ("As a class member who did not timely opt out, Plaintiff is
 23 therefore bound by the class settlement, and by res judicata. . ."). For all of these reasons,
 24 Plaintiffs have not carried their burden to show that class certification is appropriate under
 25 Rule 23(a) and their Motion should be denied.

26 **D. Plaintiffs Have Failed to Establish That the Proposed Class Should be**
 27 **Certified as a Mandatory Class Action Under Rule 23(b)(1).**

28 Plaintiffs seek certification under both Rule 23(b)(1)(A) and Rule 23(b)(1)(B), but

1 the developed record establishes they have not satisfied either prong. As noted, Rule
 2 23(b)(1) classes are mandatory, without due process notice or opt-out rights. Because of
 3 this, courts should narrowly apply this rule. *Dukes*, 564 U.S. at 345.

4 While it is true that, in some circumstances, ERISA breach of fiduciary actions
 5 seeking equitable relief can be certified under Rule 23(b)(1)(A), the specific claims and
 6 relief sought here do not satisfy the standard. A class action is maintainable under Rule
 7 23(b)(1)(A) if “prosecution of separate actions … would create a risk of inconsistent or
 8 varying adjudications with respect to individual members of the class which would
 9 establish ***incompatible standards of conduct*** for the party opposing the class....” *Zinser v.*
 10 *Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001) (emphasis added) (citing Fed.
 11 R. Civ. P. 23(b)(1)(A)). “The phrase ‘incompatible standards of conduct’ refers to the
 12 situation where ‘different results in separate actions would impair the opposing party’s
 13 ability to pursue a ***uniform continuing course of conduct*Id. (emphasis added) (quoting
 14 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1773 at 431 (2d ed 1986)).
 15 “Certification under Rule 23(b)(1)(A) is therefore not appropriate in an action for
 16 damages.” *Id.* (citing *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir.
 17 1976); *McDonnell Douglas Corp. v. U.S. Dist. Court*, 523 F.2d 1083, 1086 (9th Cir. 1975))
 18 (finding that a request to “establish a medical monitoring fund” while couched as a request
 19 for relief in the form of a course of conduct that could be certifiable under Rule 23(a)(1)(B)
 20 was “in essence” a request for monetary relief and refusing to apply the provision).**

21 Plaintiffs’ requests do nothing more than ask the Court to order Defendant to comply
 22 with existing legal obligations under ERISA. (*Compare, e.g.*, Doc. 1 at 30-31 (seeking, for
 23 example to “enjoin . . . future ERISA violations” and “reform the Plan” to “obtain bids for
 24 recordkeeping expenses and to pay only reasonable recordkeeping expenses)). There is no
 25 credible risk that any other case brought by any putative class member could result in an
 26 “inconsistent adjudication” that affirmatively required Defendant to violate ERISA, never
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1 obtain bids for recordkeeping expenses, or pay unreasonable recordkeeping fees.⁸ At most,
 2 the risk is that a putative class member may succeed on an individual claim seeking to force
 3 Defendant to generally engage in conduct consistent with ERISA's requirements and some
 4 may not, which circumstance does not justify certifying a class under Rule 23(b)(1)(A).
 5 *See, e.g., In re Bendectin Prods. Liability Litig.*, 749 F.2d 300, 305 (6th Cir. 1984) ("The
 6 fact that some plaintiffs may be successful in their suits against a defendant while others
 7 may not, is clearly not a ground for invoking Rule 23(b)(1)(A)."); *compare also, e.g., Casa*
 8 *Orlando Apts., Ltd. v. Fed. Nat. Mortgage Ass'n*, 624 F.3d 185, 197-198 (5th Cir. 2010)
 9 ("An incompatible judgment would arise if one court *required* Fannie Mae to continue its
 10 relationship with GMACCM while another court *prevented* Fannie Mae from working with
 11 GMACCM. Such a scenario is implausible given the facts of this case.").

12 Plaintiffs' argument under Rule 23(b)(1)(B) is likewise flawed. Rule 23(b)(1)(B)
 13 applies only when there is a risk that "adjudications with respect to individual class
 14 members ... would be dispositive of the interests of the other members not parties to the
 15 individual adjudications or would substantially impair their ability to protect their
 16 interests." Fed. R. Civ. P. 23(b)(1)(B). Certification under this rule is only appropriate
 17 where an individual lawsuit will "inescapably [] alter the substance of the rights of others
 18 having similar claims." *Zinser*, 253 F.3d at 1196-97. Accordingly, it has typically been
 19 applied in the trust context where relief is being sought from a limited fund to which
 20 multiple beneficiaries lay claim, *compare Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834-
 21 35 (1999), and it is not intended to permit certification based on the mere fact that a decision
 22 in one case might serve as legal precedent in another. *Zinser*, 253 F.3d at 593; *see also In*
 23 *re Conagra Foods, Inc.*, 90 F. Supp.3d 919, 990 fn. 207 (C.D. Cal. 2015) (denying class
 24 where individualized decisions did not support class certification); *Huegel v. City of*
 25 *Easton*, 2002 WL 32348320, at *5 (E.D. Pa. Oct. 23, 2022) ("[T]he individualized nature

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 28 ⁸ The Ninth Circuit has likewise rejected any assertion that the risk separate courts may
 order slightly different administrative schemes are potential "inconsistent" courses of
 conduct which are implicated by Rule 23(a)(1)(B). *Compare Zinser*, 253 F.3d at 1194-85
 (citing *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973)).

1 of the claims are not dispositive of subsequent cases, and, as a result, class certification
 2 under Rule 23(b)(1)(B) is inappropriate.”).

3 Here, there is no “limited fund” necessitating certification under Rule 23(b)(1)(B).
 4 Nor would denying Plaintiffs’ Motion and having plan participants and beneficiaries
 5 pursue their own individual claims otherwise implicate the circumstances for which Rule
 6 23(b)(1)(B) was intended. Without class certification, a finding by one court that certain
 7 actions of Defendant did or did not breach ERISA’s fiduciary duty of prudence during the
 8 Proposed Class Period would be nothing but legal precedent in a subsequent action brought
 9 against Defendant by a different individual plaintiff. As discussed in *Zisner*, this risk is
 10 simply not enough to certify a mandatory class under Rule 23(b)(1)(B).

11 Indeed, the inability to opt out of a Rule 23(b)(1) certification in the circumstances
 12 present here where the interests of class members are so divergent effectively flips the
 13 concerns of this Rule on its head, such that *invoking it* to certify a class is actually what
 14 would prejudice the putative class members’ interests by depriving them—without due
 15 process—of the ability to make the arguments that would maximize the remedy available
 16 to them. It is thus certification of the putative class as proposed by Plaintiffs—and not
 17 denial of their Motion—that would establish a situation where this lawsuit “inescapably”
 18 harms the substance of the rights of absent class members. For this additional reason,
 19 Plaintiffs’ Motion should be denied. *Compare Broussard v. Meineke Discount Muffler*
 20 *Shops, Inc.*, 155 F.3d 331, 339 (4th Cir. 1998) (discussing fundamental error in certifying
 21 a class with a conflict in remedial interests and noting “Pursuing a damage remedy that was
 22 at best irrelevant and at worst antithetical to the long-term interests of a significant segment
 23 of the putative class added insult to the injury of abandoning the only remedy in which that
 24 segment … was interested. Plaintiffs’ strategy thus illustrates the error of allowing them to
 25 sue on behalf of ‘all’ Meineke franchisees”).

26 III. CONCLUSION

27 For the reasons stated herein, this Court should deny Plaintiffs’ Motion.

1 DATED: December 30, 2024
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